Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 1, 1998

Ms. Susan M. Cory
General Counsel
Texas Workers' Compensation Commission
Southfield Building, MS-4D
4000 South IH-35
Austin, Texas 78704-7491

OR98-1363

Dear Ms. Cory:

You ask whether certain information is subject to required public disclosure under the Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 115579.

The Texas Workers' Compensation Commission (the "commission") received a request for an investigative report as well as "the letter of closure written to the [named] former employee at the conclusion of the investigation." You claim that "portions of the requested information are exempt" from disclosure under sections 552.101, 552.103, 552.108, 552.111, 552.117 and 552.024 of the Government Code. We have considered the exceptions and issues you have raised and have reviewed the documents at issue.

In Open Records Decision No. 641 (1996), this office determined that medical information obtained pursuant to the Americans with Disabilities Act of 1990 (the "ADA"), 42 U.S.C. §§ 12101 *et seq.*, is confidential under section 552.101 of the Government Code in conjunction with 42 U.S.C. § 12112. *See also* 29 C.F.R. § 1630.14(b)(1) (providing that medical information "shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record").

Section 12112(d)(3)(B) of title 42 of the United States Code provides that information regarding medical condition or medical history may be disclosed as follows:

> (i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

> (ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and
>
> (iii) government officials investigating compliance with this Act shall be provided relevant information on request.

These restrictions are applicable to information about medical conditions obtained from employees. 29 C.F.R. § 1630.14(c)(1)(i)-(iii). Additionally, we note that the commission, an employer subject to title I of the ADA, *see* 42 U.S.C. § 12111(5), collects and maintains the records at issue. An individual filling out either an ADA position questionnaire or the self-identification of reportable handicap form is providing information about his or her medical condition and medical history. The ADA provides that information about medical conditions and medical histories of applicants or employees must be (1) collected and maintained on separate forms, (2) kept in separate medical files, and (3) treated as confidential medical records. The documents which denote ADA information concerning the investigation of ADA issues is made confidential under section 12112(d) of the ADA, and consequently, we conclude that it may be released only as provided under that section. We have marked the ADA information accordingly.

We also observe that the documents contain the home addresses, home telephone numbers, and social security numbers of employees. Sections 552.117 and 552.024 provide that a current or former public employee or official can opt to keep private their home address, home telephone number, social security number, and information that reveals whether that person has family members. You must withhold information about those public employees and officials who, as of the time of the request for the information, had elected to keep the information private. Open Records Decision Nos. 530 (1989) at 5, 482 (1987) at 4, 455 (1987). Federal law also provides for the confidentiality of social security numbers obtained or maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. 42 U.S.C. § 405(c)(2)(C)(viii); Open Records Decision No. 622 (1994) at 4.

Additionally, we note that the provisions of the Medical Practice Act (the "MPA"), article 4495b of Vernon's Texas Civil Statutes. Section 5.08(b) and (c) of the MPA provide:

> (b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.
>
> (c) Any person who receives information from confidential communications or records as described in this section other than the persons listed in Subsection (h) of this section who are acting on the patient's behalf may not disclose the information except to the extent

that disclosure is consistent with the authorized purposes for which the information was first obtained.

Section 5.08(j)(1) provides for release of medical records upon the patient's written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Section 5.08(j)(3) requires that any subsequent release of medical records be consistent with the purposes for which the commission obtained the records. Open Records Decision No. 565 (1990) at 7. Upon examination of the submitted documents, we did not observe any documents which appear to come within the purview of the MPA. Nonetheless, access to medical records is not governed by chapter 552 of the Government Code, but rather provisions of the MPA. Open Records Decision No. 598 (1991).

Section 552.111 excepts from disclosure "only those internal agency communications consisting of advice, recommendations, opinions and other material reflecting the deliberative or policymaking processes of the governmental body at issue." Open Records Decision No. 615 (1993) at 5. This exception is intended to protect advice and opinions given on policy matters and to encourage frank and open discussions within an agency in connection with the agency's decision-making processes. *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 412 (Tex. App.--Austin 1992, no writ) (citing *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.). This section does not protect facts or written observations of facts. Open Records Decision No. 615 (1993) at 5. This office previously held that section 552.111 was applicable to the advice, opinion and recommendations used in decision-making processes within an governmental entity. Open Records Decision Nos. 574 (1990) at 1-2, 565 (1990) at 9. However, as noted above, in *Texas Department of Public Safety v. Gilbreath*, the court addressed the proper scope and interpretation of this section. In light of that decision, this office reexamined its past rulings. In Open Records Decision No. 615 (1993), we determined that in order to be excepted from disclosure, the advice, opinion, and recommendation must be related to policymaking functions of the governmental body rather than to decision-making concerning routine personnel and administrative matters. The information at issue concerns a personnel matter involving an employee and as such appears to involve routine personnel or administrative matters rather than the commission's policymaking functions. Thus, we have examined the information presented and have marked some portions for withholding under section 552.111.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. The commission has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. The commission must meet both prongs of this test for information to be excepted under section 552.103(a).

Litigation cannot be regarded as "reasonably anticipated" unless there is concrete evidence showing that the claim that litigation may ensue is more than mere conjecture. Open Records Decision Nos. 452 (1986), 331 (1982), 328 (1982). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision Nos. 452 (1986), 350 (1982). This office has concluded that litigation is reasonably anticipated when an attorney makes a written demand for disputed payments and promises further legal action if they are not forthcoming, and when a requestor hires an attorney who threatens to sue a governmental entity. Open Records Decision Nos. 555 (1990), 551 (1990). However, the fact that an individual has hired an attorney or that a request for information was made by an attorney does not, without more, demonstrate that litigation is reasonably anticipated. Open Records Decision No. 361 (1983) at 2.

In this case, the request for information was made by one of the individuals involved in the internal investigation. The individual does not threaten litigation or make any demands for payment. The commission offers no evidence of any threat of litigation. Therefore, we conclude that the commission has not established that litigation is reasonably anticipated. Therefore, the commission may not withhold the requested information under section 552.103.

Section 552.108 of the Government Code reads as follows:

> (a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:
>
> > (1) release of the information would interfere with the detection, investigation, or prosecution of crime;
> >
> > (2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication; or
> >
> > (3) it is information that:
> >
> > > (A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or
> > >
> > > (B) reflects the mental impressions or legal reasoning of an attorney representing the state.
>
> (b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to

> law enforcement or prosecution is excepted from the requirements of Section 552.021 if:
>
> > (1) release of the internal record or notation would interfere with law enforcement or prosecution;
> >
> > (2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication; or
> >
> > (3) the internal record or notation:
> >
> > > (A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or
> > >
> > > (B) reflects the mental impressions or legal reasoning of an attorney representing the state.
>
> (c) This section does not except from the requirements of Section 552.021 information that is basic information about an arrested person, an arrest, or a crime.

Generally, a governmental body claiming an exception under section 552.108 must reasonably explain, if the information does not supply the explanation on its face, how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(a)(1), (b)(1), .301(b)(1); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). In this instance, you have not stated that the requested information pertains to a pending criminal investigation or prosecution so as to demonstrate that its release would interfere with the detection, investigation, or prosecution of crime. Nor have you demonstrated that the requested information relates to a criminal investigation that *concluded in a result* other than a conviction or deferred adjudication. *See* Gov't Code § 552.108(a)(2), (b)(2). You may not withhold the requested information under section 552.108.

Texas courts long have recognized the informer's privilege, *see Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928), and it is a well-established exception under the Open Records Act. Open Records Decision No. 549 (1990) at 4. For information to come under the protection of the informer's privilege, the information must relate to a violation of a civil or criminal statute. *See* Open Records Decision Nos. 515 (1988) at 2-5, 391 (1983). The privilege excepts the informer's statement only to the extent necessary to protect that informer's identity. Open Records Decision Nos. 549 (1990) at 5. Once the identity of the informer is known to the subject of the communication, the exception is no longer applicable. Open Records Decision

No. 202 (1978) at 2. You have not indicated what civil or criminal statute has been violated, consequently, you may not withhold any of the information from public disclosure under the informer's privilege pursuant to section 552.101.

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

Janet I. Monteros
Assistant Attorney General
Open Records Division

JIM/glg

Ref.: ID# 115579

Enclosures: Submitted documents

cc: Ms. Isabel E. Fawcett
Human Resources
Texas Workers' Compensation Commission
Southfield Bldg., MS-74
4000 South IH-35
Austin, Texas 78704-7491
(w/o enclosures)